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No. 941 Misc.

Office-Supreme Court
FILED
JAN 15 1968
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

MOTION OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

No. 344 Misc.

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

MOTION OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Now comes the petitioner, Illinois Division of the American Civil Liberties Union, by its attorney, Elmer Gertz, and represents unto the Court as follows:

1. The American Civil Liberties Union is an organization dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

2. One of the least examined, but most important, guarantees of our Bill of Rights is contained in the Eighth Amendment to the United States Constitution which prohibits the infliction of cruel and unusual punishment. The

last case in this Court to consider directly whether the death penalty was cruel and unusual punishment was *In re Remmler,* 136 U.S. 436 (1890), where it was held that the death penalty was not a cruel and unusual punishment. Since that time, however, this Court has indicated that that holding may no longer be valid. In *Trop* v. *Dulles,* 356 U.S. 86 (1958), it was said, on behalf of four justices, that the content of the Eighth Amendment is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 100. It is true that within that same opinion it was stated in passing, without any actual consideration of the matter, that the death penalty did not violate the constitutional concept of cruelty, but that statement was clearly dictum. Furthermore, in the nine years since that opinion was handed down, great changes in the attitude of society have come about in connection with the death penalty.

3. The petitioner in this case, William Witherspoon, in his petition for certiorari, has raised the point that the death penalty is cruel and unusual punishment. The nature of his position, however, having to present further issues involved in his case, has precluded him from fully delving into this problem. This issue is not unique to his case. It is one of great importance for many persons throughout the country. Petitioner in this motion, by virtue of its aims and objectives, namely, to uphold and strengthen the Bill of Rights, is in the unique position of being able to bring to this Court's attention many of the factors which bear upon this important issue free from any necessity to divert its efforts to other issues.

4. That the taking of a human life is cruel cannot be seriously disputed. The fact that the life is taken under sanction of the government cannot change this fact. In

deed, the manner in which the government carries out this function must of necessity enhance the cruelty involved.

5. In addition, there is much data to support the proposition that capital punishment is indeed unusual in our present society, and is becoming more and more unusual every year. Last year only one person, out of the thousands convicted of murder, was executed. The carrying out of a death sentence is in the nature of a game of chance, which, in itself, is violative of due process.

6. This case involves a further important question as to the manner in which the death sentence was imposed upon the petitioner Witherspoon. As pointed out on pages 13-16 of petitioner Witherspoon's petition for writ of certiorari, under the Illinois statutes in force at the time, one accused of murder who chose to assert his right to trial before a jury was deprived of the opportunity to introduce mitigating evidence before sentencing. The punishment was set by the same jury which determined guilt, and the opportunity to introduce evidence in mitigation was extremely limited under Illinois law. Such a procedure places the defendant in the impossible position of arguing that he is not guilty and at the same time of introducing evidence that even if he is guilty he should not be given the death sentence.

7. Under this procedure, which is still followed in Illinois (Ch. 38, §1-7, Ill. Rev. Stats. 1965), everyone found guilty of crime in Illinois was entitled to introduce evidence in mitigation of sentence after a finding of guilty, except those persons found guilty of murder by a jury. Thus, where an accused is exposed to the greatest penalty sanctioned by the law, he is precluded from fully informing the sentencing body of the pertinent factors which are to be taken into consideration in every other situation.

Had the accused been found guilty of the same crime b a judge, after having waived the constitutional right to jury trial, he would have had the opportunity to introduc such mitigating evidence. Such an issue is certainly on which should be considered by this Court.

8. The petitioner has received the consent of petitione William Witherspoon to file a brief *amicus curiae*, b the State has declared that it "cannot enter into a co sent"; it has not directly objected to such brief.

9. There are other constitutional issues in this cas such as the deprivation of the petitioner Witherspoon right to apply for certiorari in connection with his origin conviction. He had no counsel at that time.

This petitioner, therefore, respectfully requests that be allowed to file a brief *amicus curiae* in support of pe tioner William Witherspoon's petition for certiorari f the purpose of bringing to this Court's attention the ma reasons which support the necessity of this Court gra ing certiorari to consider whether capital punishment d violate the Eighth Amendment to the United States C stitution, as well as other basic constitutional issues.

Respectfully submitted,

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